No. 86-1380
No. 86-1424
No. 87-469

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ARKANSAS PUBLIC SERVICE COMMISSION, *et al.*,
Petitioners

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents

and

ARKANSAS POWER & LIGHT COMPANY
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents

and

REYNOLDS METAL COMPANY, *et al.*,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals For The District of Columbia Circuit

BRIEF FOR THE CITY OF NEW ORLEANS IN OPPOSITION TO THE PETITIONS

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QUESTION PRESENTED

Whether the Court of Appeals was correct in affirming the Federal Energy Regulatory Commission's exercise of jurisdiction over interstate wholesale sales of electric energy under section 201 of the Federal Power Act, and its remedial authority under sections 205 and 206 of the Act, by which the Commission ordered a reallocation of nuclear plant project costs among the wholly-owned operating subsidiaries of a utility holding company, where: (i) the project had been planned and constructed for the benefit of all the subsidiaries; (ii) all the subsidiaries were parties to the contracts establishing cost sharing arrangements for the project; and (iii) the original allocation of costs among the subsidiaries, located in different states, was found to be unjust and unreasonable.

PARTIES TO THE PROCEEDING

The City of New Orleans respectfully refers the Court to the list of parties contained in each of the petitions.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 808 F.2d 1525, and is printed in the Appendix accompanying the petition of the Arkansas Public Service Commission, et al. (No. 86-1380) at App. 1a-96a. The court's order on rehearing vacating a portion of its earlier decision is reported at 822 F.2d 1103 and is contained in the Supplemental Appendix of petitioner Reynolds Metal Company, et al. (No. 87-469) at Supp. App. 14a-15a.

The opinions of the Federal Energy Regulatory Commission ("FERC" or the "Commission") and its administrative law judges leading to the court of appeals decision are *Middle South Energy, Inc.*, 31 FERC ¶ 61,305 (1985) (App. 141a-222a); *Middle South Energy, Inc.*, 32 FERC ¶ 61,425 (1985) (Order Denying Rehearing) (App. 97a-140a); *Middle South Services, Inc.*, 30 FERC ¶ 63,030 (1985) (App. 223a-373a); and *Middle South Energy, Inc.*, 26 FERC ¶ 63,044 (1984) (App. 374a-526a).

JURISDICTION

The petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1). Two of the petitioner groups, the Arkansas Public Service Commission, State of Arkansas, Arkansas-Missouri Congressional Delegations and Missouri Public Service Commission (the "Arkansas/Missouri parties"), and Arkansas Power & Light Company ("AP&L"), filed their petitions shortly after issuance of the court's opinion on January 6, 1987, but before the time for requests for rehearing had expired. Proceedings in this Court were deferred once requests for rehearing were filed. The petitioner group that includes Reynolds Metal

Company, Associated Industries of Arkansas, Riceland Foods, Inc. and Weyerheuser Company (the "Arkansas Industries"), filed its petition on September 22, 1987, subsequent to the D.C. Circuit's order on rehearing. The D.C. Circuit's consideration of jurisdictional issues, the focus of the instant petitions, was not affected by the court's decision upon rehearing to remand the case to the FERC to reconsider the methodology used to reallocate the Grand Gulf 1 costs.

STATUTES INVOLVED

The pertinent statutory provisions of the Federal Power Act, sections 201, 205, and 206, 16 U.S.C. §§ 824, 824d and 824e are set forth at App. 527a-541a.

STATEMENT OF THE CASE

In the interest of brevity, the City of New Orleans adopts by reference the "Background" section of the D.C. Circuit opinion (App. 7a-32a) as its statement of the case through the course of proceedings before FERC. In addition, the City of New Orleans states as follows:

The City of New Orleans is a municipal corporation existing under the laws of the State of Louisiana and its Home Rule Charter. The Council of the City of New Orleans (the "Council") exercises all legislative powers of the City, and also is empowered under state law to regulate the rates and other activities of public utilities serving New Orleans. Thus, the City regulates New Orleans Public Service Inc. ("NOPSI"), one of the operating subsidiaries of Middle South Utilities, Inc. ("MSU").

Since 1985, when the FERC issued its order allocating the costs of the Grand Gulf 1 nuclear project,

the Council has been involved in retail ratemaking procedures relating to NOPSI's request for a staggering increase in rates to cover its 17 percent share of the Grand Gulf 1 costs. The Council's regulatory efforts have led to two federal court proceedings by which NOPSI has attempted to prevent the Council from exercising its retail ratemaking functions, including a review of NOPSI's prudence in relation to the retail rate aspects of the Grand Gulf 1 purchases.[1]

In its order instituting the prudence investigation, the Council specifically recognized the FERC's wholesale rate allocation of Grand Gulf 1 costs and stated

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[1] In the first federal court proceeding, *New Orleans Public Service, Inc. v. City New Orleans*, 782 F.2d 1236, *withdrawn in part*, 798 F.2d 858 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1910 (1987), NOPSI sought an injunction ordering the Council to pass through to ratepayers, immediately and without exercising traditional regulatory functions, a 60 percent rate increase that threatened a severe rate shock effect on New Orleans. The action was dismissed by the district court on the basis of the abstention doctrine, a decision that ultimately was affirmed by the U.S. Court of Appeals for the Fifth Circuit. This Court denied *certiorari* on April 20, 1987. The retail rate case was settled by an order involving a phase-in plan to moderate rate shock as well as partial cost absorption by NOPSI shareholders. *See* Council Res. No. R-86-112 (Mar. 20, 1986).

In October 1985, the Council instituted an investigation into the prudence of NOPSI's actions with regard to Grand Gulf 1 as part of the retail ratemaking proceeding. NOPSI initiated a second federal court proceeding to enjoin the investigation. That case was dismissed in December 1986 on the basis, *inter alia*, of the abstention doctrine and lack of ripeness, and is presently before the Fifth Circuit. *New Orleans Public Service, Inc. v. City of New Orleans*, Civ. Act. No. 85-5273 (E.D. La. dismissed Dec. 19, 1986), *appeal docketed*, No. 87-3049 (5th Cir., Jan. 23, 1987) The aforesaid settlement permitted the Council to continue its prudence inquiry.

that the Council would not seek to invalidate any interstate contracts or to have NOPSI pay a rate other than as prescribed by the FERC. Council Res. No. R-85-636 (Oct. 17, 1985). Thus, the City of New Orleans has not and does not challenge the FERC's jurisdiction to allocate the costs of the Grand Gulf 1 nuclear project among the MSU operating companies as an exercise of its authority over wholesale sales of electric energy, the only issue properly before this Court on these petitions.[2]

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[2] The Arkansas/Missouri parties and the Arkansas Industries have suggested that their petitions should be granted in conjunction with this Court's consideration of the appeal in *Mississippi Power & Light Company v. Mississippi, No. 86-1970, juris. postponed,* 56 U.S.L.W. 3242 (U.S. 1987). Supplemental Brief of the Arkansas/Missouri parties at 3-4; Petition of Arkansas Industries at 12; 28-29. The issues in *Mississippi Power & Light,* a case in which the Court's jurisdiction has not yet been established, center on the proper scope of state regulatory retail functions once the FERC has established a wholesale rate. This is an entirely distinct issue from the FERC's jurisdiction over wholesale rates, and the two cases should not be considered together.

THE PETITIONS SHOULD BE DENIED SINCE THE D.C. CIRCUIT'S AFFIRMATION OF FERC'S JURISDICTION OVER AN INTERSTATE WHOLESALE POWER SALES AGREEMENT WAS PROPER AND CREATES NO CONFLICT AMONG THE COURTS OF APPEAL OR WITH OPINIONS OF THIS COURT

In 1982, MSU submitted to the FERC the Unit Power Sales Agreement ("UPSA") for Grand Gulf 1, to which AP&L, a petitioner here, was a signatory. In the UPSA, AP&L agreed to give Middle South Energy, Inc. ("MSE"), the MSU subsidiary formed to finance and own the nuclear project, the right "to unilaterally make application to the FERC for a change in . . . any . . . term or condition of this agreement", including, by definition, those dealing with obligations to purchase and sell (R. 2982). AP&L thus acknowledged FERC jurisdiction of the UPSA. The Arkansas/Missouri parties also have acknowledged FERC jurisdiction of the UPSA in the proceedings below.[3]

Yet once the FERC found the UPSA to be unjust and unreasonable and exercised its remedial powers to reform the agreement, the Arkansas/Missouri parties (that had been unjustly favored by the original UPSA) changed their positions. They developed arguments, rejected first by the administrative law judges, next by the Commission, and a third time by the D.C. Circuit, to deny the FERC's jurisdiction to

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[3] Brief of Intervenors, the Arkansas Public Service Commission, the Missouri Public Service Commission, the Arkansas-Missouri Congressional Delegation, the State of Arkansas, and the Cities of Conway and West Memphis, Arkansas, No. 85-1611 (D.C. Cir. filed Dec. 23, 1985) at p. 18.

remedy the allocation of Grand Gulf 1 costs set forth in the UPSA.

Three principal arguments against the FERC's exercise of jurisdiction are presented by the petitioners here. First, petitioners contend that FERC jurisdiction under section 201 of the Federal Power Act does not extend to generation facilities. Second, they argue that the FERC has unlawfully forced AP&L to purchase Grand Gulf power. Third, the petitioners allege that the FERC intruded on state regulatory authority, and in so doing, contravened the purposes of the Public Utility Holding Company Act ("PUHCA"). These arguments were rejected by the D.C. Circuit in its opinion below.

Petitioners' disagreement with the result reached by the court of appeals is not sufficient justification for invoking this Court's powers of review. Petitioners have not established that in reaching its determination (that the FERC properly exercised jurisdiction under the Federal Power Act to reallocate the costs of the Grand Gulf 1 project among the MSU operating subsidiaries), the D.C. Circuit created a conflict with decisions rendered by other courts of appeal or that it contravened any prior decisions of this Court. Indeed, to the extent this Court has provided guidance on the jurisdictional questions at issue here, the D.C. Circuit's opinion tracks existing precedent. Thus, the case does not warrant Supreme Court review and the petitions should be denied.

A. The D.C. Circuit Properly Found An Affirmative Grant Of Jurisdiction To The FERC Under Section 201, 205, And 206 Of The Federal Power Act.

In upholding the FERC's exercise of jurisdiction over the UPSA, which allocated the Grand Gulf 1

costs among the MSU operating subsidiaries, the D.C. Circuit first examined the affirmative basis for the FERC's jurisdiction. The court properly found a basis for the Commission's jurisdiction under section 201 of the Federal Power Act, 16 U.S.C. § 824, which grants the Commission jurisdiction over "the sale of electric energy at wholesale in interstate commerce" and over "all facilities for such . . . sale . . . ." (App. 32a). The sale of Grand Gulf 1 power by MSE undoubtedly is a "sale of electric energy at wholesale in interstate commerce," and the UPSA, which memorializes the sale, is subject to the FERC's jurisdiction.

Moreover, under section 205 of the Federal Power Act, 16 U.S.C. § 824d, all rates and charges and all rules and regulations affecting such rates and charges must be "just and reasonable." If the Commission determines that any rate or charge or any contract affecting such rate is unjust and unreasonable, the Commission "shall determine the just and reasonable rate, charge . . . or contract to be thereafter observed and enforced, and shall fix the same by order." Section 206 of the Federal Power Act, 16 U.S.C. § 824e. Pursuant to this statutory directive, the Commission found that the UPSA allocation of Grand Gulf 1 costs was unreasonable, and utilized its remedial powers to modify the agreement, an exercise of authority that the court below found to be "plainly within Commission jurisdiction." (App. 37a).

The D.C. Circuit found support for this holding in a decision of the Eighth Circuit involving the Northern States Power ("NSP") Companies, *State of Minnesota v. Federal Energy Regulatory Commission*, 734 F.2d 1286 (8th Cir. 1984). The Minnesota Commission

had argued that the FERC lacked jurisdiction to review an amendment to a "Coordinating Agreement" among the NSP Companies, since the agreement does not establish a wholesale rate for electricity, but rather serves as a mechanism for allocating costs among the NSP affiliates. The Eighth Circuit disagreed, noting that the contract contains numerous provisions authorizing the NSP companies to exchange electric power among themselves in return for payment, and therefore serves to establish wholesale rates. Thus, the proposed amendment, which altered a methodology for determining rate of return, was held to affect the wholesale rate under the agreement and form a basis for Commission jurisdiction. As the allocation of Grand Gulf 1 costs similarly affects the wholesale rate for the MSU companies, a reallocation of those costs upon a determination that the UPSA was unreasonable was within the Commission's jurisdiction. (App. 37a).

The Commission's authority to reallocate costs affecting wholesale rates is also supported by this Court's analysis in *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986). In *Nantahala*, the Court overturned a decision of the North Carolina Supreme Court affirming an order of the North Carolina Utilities Commission which adopted a different methodology for allocating low-cost "entitlement" power between two affiliated companies than the methodology directed by the FERC. The Court held that the FERC's reallocation of entitlement power preempted the state's authority to adopt a different formula since the allocation impacted one of the affiliate's wholesale rates. The D.C. Circuit found *Nantahala* to be analogous:

> FERC's allocation of Grand Gulf's costs and capacity, like the setting of entitlement percentages in *Nantahala Power & Light*, does not set a sales price, but does directly affect costs and, consequently, wholesale rates. We cannot disregard the Supreme Court's clear and timely message that FERC's jurisdiction under such circumstances is unquestionable.[4]

(App. 38a). As held by the court below, the affirmative grant of authority under sections 201, 205 and 206 of the Federal Power Act sustains the Commission's exercise of jurisdiction over the UPSA allocation of Grand Gulf costs.

B. The Federal Power Act Exception For Generating Facilities Does Not Preclude Jurisdiction By The FERC Over This Wholesale Sale.

The Federal Power Act extends FERC jurisdiction over wholesale sales of electricity but excludes jurisdiction "over facilities used for generation of electric energy or over facilities used in local distribution . . . ." 16 U.S.C. § 824(b)(1). Section 201 also provides for "federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III . . . ." *Id.* In the D.C. Circuit's view, the Commission's "regulation" of the MSE generation facility was a legitimate by-product of the FERC's

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[4] The Arkansas/Missouri parties contend that *Nantahala*, which involved a purchased power agreement, is not properly applied to a unit power sales agreement since the latter pertains to a specific generating facility and is therefore exempt from Commission jurisdiction. This distinction does not appear to be critical to the Court's analysis of the FERC's authority in *Nantahala*. Moreover, generating facilities are not entirely exempt from Commission jurisdiction. *See* discussion *infra*, Section B.

power to regulate wholesale rates. The petitioners argue that no such "by-product" of FERC jurisdiction is permissible where generation facilities are involved.

The keystone of the petitioners' argument is the decision by this Court in *Connecticut Light & Power Company v. Federal Power Commission*, 324 U.S. 515 (1945). The *Connecticut Light* case, however, did not focus on the "generating facilities" exception to Commission jurisdiction set forth in section 201(b), but on the "local distribution" exception. Additionally, the case involved the Federal Power Commission's assertion of jurisdiction over an electric utility located and selling exclusively in the state of Connecticut.

Upon reviewing Connecticut Light's system, the Court concluded that "the predominant characteristic of the company's overall operation is that of a local and intrastate service." 324 U.S. at 521. The Court found that the Commission had failed to analyze whether this local nature brought Connecticut Light under the "local facilities" exemption in section 201(b).

The Court discussed the interplay of this jurisdictional exception and the federal interest expressed in section 201(a) of the Act. With respect to the Commission's jurisdiction over interstate sales and transmission, the Court affirmed that:

> Of course as preamble to all of these provisions stands the policy declaration that Federal regulation 'of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest . . .' § 201(a).

Id. at 523.

In contrast to the facts of *Connecticut Light*, MSE's only existing facility, the Grand Gulf 1 project, is a multibillion dollar generating facility planned and constructed to supply capacity and energy to meet the needs of four utilities serving a four-state region. Its *only* sales will be sales at wholesale in interstate commerce to the four utilities in the Middle South power pool. MSE will make no retail sales. It has no local customers or load. It has no distribution system, local or otherwise. MSE's "predominant characteristic", indeed, its sole purpose, is directly antithetical to that of Connecticut Light: it serves only an interstate function and no local function whatsoever.

Thus, the petitioners' attempt to suggest a conflict between the D.C. Circuit opinion and previous rulings of this Court is unavailing. In the circumstances of this case, the FERC's reallocation of costs was entirely proper, despite the fact that a generating facility was affected as a by-product of such regulation.[5]

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[5] In reality, the only effect on the generating facilities is in terms of the sharing of costs of the facility. FERC has not attempted to regulate, *e.g.*, the size, location or operation of the facility. The Arkansas/Missouri parties assert, nevertheless, that if the decision below is left undisturbed, FERC's jurisdiction would be extended to "every major generation facility in the nation . . . ." Petition at 9-10. They also argue that if FERC's assertion of jurisdiction over contracts affecting rates is allowed to stand, FERC would have authority to review and approve, *e.g.*, management decisions on contracts with labor, or the purchase of trucks, all of which affect rates. *Id.* at 10, n. 8. *See also* Arkansas Industries' Petition at 19. These arguments are entirely speculative. The FERC has not attempted to extend its authority to "every major generation facility" or to matters affecting the construction or operation of generation facilities. Certainly, no such extension of FERC authority is involved here.

C. The FERC's Reallocation Of Grand Gulf Costs Did Not Create An Unlawful "Forced Purchase" Of Grand Gulf Power.

The D.C. Circuit also properly rejected petitioners' second argument against FERC's exercise of jurisdiction, *viz.*, that the reallocation of Grand Gulf 1 costs unlawfully "forced" AP&L to purchase Grand Gulf 1 power. The court "agree[d] with the Commission that 'the issue here is not whether a company should be forced to purchase or sell power, but rather is the appropriate allocation of costs among integrated companies owned by the same parent.' " (App. 43a-44a). It is significant that petitioners do not argue to this Court that the court's holding on the "forced purchase" issue creates a conflict with other circuits or decisions of this Court. Indeed, petitioners cite no case law in support of their argument.[6]

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[6] The Arkansas Industries criticize the court's reliance on *Pennsylvania Water and Power Co. v. Federal Power Commission*, 343 U.S. 414 (1952), as precedent for the FERC's authority to modify the terms of coordinating contracts of closely integrated power systems when it deems those arrangements unlawful, on the basis that in *Pennsylvania Water*, the court merely required the continuation of an existing practice. Whether a contractual arrangement is new or long-standing, the FERC's authority to alter the arrangement is clear under section 206 of the Federal Power Act if the contract renders a rate unjust or unreasonable. 16 U.S.C. § 824e. *See also Central Iowa Power Cooperative v. Federal Energy Regulatory Commission*, 606 F.2d 1156 (D.C. Cir. 1979).

Before the D.C. Circuit, the petitioners advanced *Southern Company Services, Inc., 20 FERC ¶ 61,332 (1982) Otter Tail Power Co. v. Federal Power Commission*, 473 F.2d 1253 (8th Cir. 1973), as supportive of their view that a "forced purchase" is unlawful. Those cases were easily distinguished by the D.C. Circuit. In

The Arkansas/Missouri parties suggest that the FERC's reallocation of Grand Gulf 1 costs was impermissible since it created a different standard for purchases among holding company affiliates than the Commission employs for independent utilities. This argument sidesteps the fact that in the circumstances here, a "different standard" may be appropriate: the Grand Gulf 1 plant was constructed for the benefit of all MSU operating companies including AP&L, and AP&L had an historic involvement in the decisions and agreements leading to the UPSA. Indeed, AP&L remains liable to MSE's creditors for a substantial portion of Grand Gulf 1 costs pursuant to the "Availability Agreement." (App. 18a-19a.) AP&L is not an innocent bystander caught in the cross-fire of FERC authority; it was a willing and active participant in the Grand Gulf 1 arrangements, albeit for a lesser share than it ultimately was allocated. The Commission's authority to alter contracts affecting unreasonable rates "allows the Commission to step in and reallocate costs under section 206(a) of the Federal Power Act so that each of the operating companies is treated fairly." (App. 44a).

D. The FERC's Regulation Of Wholesale Rate Matters Does Not Impermissibly Intrude Into State Regulation.

The petitioners' third argument against the Commission's jurisdiction to reallocate Grand Gulf costs

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Southern Companies, an *unaffiliated* company intervened in a proceeding concerning a sale between the Southern Company and Florida Power and Light Company, arguing that Florida Power and Light should be required to purchase power from it. The FERC refused to order such a sale. In *Otter Tail*, a FERC order had the effect of impermissibly compelling expansion of generating facilities. No such order is involved here.

is that it unlawfully interferes with the jurisdiction of state regulatory authorities and contravenes the purposes of PUHCA. The D.C. Circuit properly rejected these arguments. The FERC, not the states, has the authority to regulate wholesale sales of electric energy such as the sale of Grand Gulf 1 power at issue here. As noted by the court: "The fact that FERC's assertion of jurisdiction has some impact on state regulation does not make it unlawful." (App. 48a).[7]

The D.C. Circuit also properly determined that the FERC's reallocation of the Grand Gulf 1 costs did not detract from the goals of PUHCA. While PUHCA is aimed at preserving local regulation of utilities owned by holding companies, PUHCA recognizes that transactions between interstate affiliates must remain within federal jurisdiction. (App. 57a).

It is notable that none of petitioners have advanced a set of facts under which this *particular* exercise of jurisdiction by the FERC interfered with a state's ability to carry out regulation of retail rates. The Arkansas/Missouri parties suggest (along with Arkansas Industries) that prudence reviews at the state level will be precluded if the decision below is allowed

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[7] The D.C. Circuit based its decision in part on this court's ruling in *Nantahala*. The City of New Orleans agrees that *Nantahala* requires states to give effect to wholesale rates established by FERC; the City does not agree, however, that *Nantahala* requires an immediate and complete pass-through of wholesale costs in retail rates. Rather, states retain jurisdiction, under the express holding of *Nantahala*, to perform traditional retail ratemaking functions, including an examination of offsetting costs and the utility management's efforts to effectuate such offsetting measures.

to stand.[8] Yet Arkansas has reached a settlement with AP&L with regard to its share of Grand Gulf 1 costs; Arkansas, unlike the City of New Orleans and Mississippi, has not conducted a prudence investigation as part of its retail regulation of AP&L's Grand Gulf 1 costs.

The permissible scope of the state retail function once FERC has established a wholesale rate has been and is currently the subject of cases presented to this Court. As indicated in the Statement of the Case, in 1985 NOPSI brought suit in federal district court against the City of New Orleans in an attempt to require an immediate pass through of Grand Gulf 1 costs to New Orleans' consumers. The federal court abstained and after the Fifth Circuit affirmed that decision, NOPSI sought review in this Court. Its petition was denied. *New Orleans Public Service, Inc. v. City New Orleans*, 107 S. Ct. 1910 (1987).[9] Additionally, the Court recently decided to hear the appeal (but postponed consideration of jurisdiction to the

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[8] The Arkansas/Missouri parties also speculate that the Commission's ruling will restrict Arkansas' regulation of *new* facilities proposed by AP&L. The existing Grand Gulf plant, not a future facility, is all that is at issue here.

[9] The City's right to conduct a prudence investigation of NOPSI's involvement in Grand Gulf—one which focuses on offsetting actions the utility could have taken to alleviate the burden of its Grand Gulf 1 share, and one which does not have as its object an invalidation of contracts or requiring NOPSI to pay less than its federally mandated share of Grand Gulf 1—is the subject of a second federal court lawsuit which was dismissed by the district court and is presently pending decision by the Fifth Circuit. *See* n. 1, *supra*.

hearing on the merits)[10] in a case involving the permissible scope of a prudence investigation of Mississippi Power & Light Company's involvement in Grand Gulf 1. *Mississippi Power and Light Co. v. Mississippi*, No. 86-1970, *juris. postponed*, 56 U.S.L.W. 3242 (U.S. 1987).

Thus, there are other cases in which this Court may determine, on a more fully developed factual record, the effect of the FERC's establishment of wholesale rates on state regulatory functions. The hypothetical fact patterns presented by the petitioners are not an appropriate basis for this Court's review of such a critical issue.[11]

CONCLUSION

For all the foregoing reasons, the petitions should be denied.

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[10] The State of Mississippi, and the City of New Orleans as *amicus*, argued that the case is not ripe for this Court's review since a final decision on prudence has not emanated from the Mississippi Commission and the Mississippi courts.

[11] Consideration of this case is not essential to the Court's consideration of the *Mississippi Power & Light Co.* appeal, as contended by petitioners. The Commission's exercise of its wholesale rate jurisdiction is an entirely distinct issue from the permissible scope of retail regulation by the states once a wholesale rate is established. Petitioners apparently are attempting to "bootstrap" their way into a grant of their petitions by linking this case with the *Mississippi Power & Light* appeal.

Respectfully submitted,

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